NO. 22470

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANT CONSTRUCTION COMPANY,

Appellant,

vs.

UNDERWRITERS AT LLOYD'S OF LONDON & NORTHWEST UNDERWRITERS,

Appellee.

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BRIEF OF APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO NORTHERN DIVISION

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Attorneys for Appellee

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STATEMENT OF THE CASE

JOSEPH W. GRANT was the founder of what is known as the GRANT CONSTRUCTION COMPANY, a corporation, but because of "heart disease" he had retired from active management of the company although he had served as a consultant in connection with some of the corporate office work.

He spent considerable time fishing and was well equipped with a splendid launch adequately equipped with a traveling as well as a trolling outboard motor and trailer which he could hitch to his car and go from lake to lake.

On the occasion involved here, he and Mrs. GRANT went to Kootenay Lake, which is in British Columbia, Canada, and there launched the boat and motors and proceeded to fish on Kootenay Lake by trolling.

A sudden squal or windstorm came up and Mr. GRANT, who was accompanied by his wife (since deceased), concluded to pull out of the heavier water and into a more protected area and tied up to the shoreline; he had turned off the motors and tried to keep the boat from being battered against the shoreline because of the wave actions. Mr. GRANT got out and tied the boat up, got back into the boat and as he did, collapsed and died, apparently instantly.

She attempted resuscitation without success.

She then tried to attract the attention of other people who might be on the lake and also to protect the boat. She was a woman of approximately sixty (60) years of age, weighed 125 pounds and got out and did exactly what Mr. GRANT had been doing in preserving and protecting the boat and eventually called for help successfully. This help came and towed the GRANT boat with the body of Mr. GRANT in it and with Mrs. GRANT, back across Kootenay Lake to Kaslo where Mr. GRANT was officially pronounced dead by a physician and surgeon who performed an autopsy, the entire body of which reads as stipulated and as found by the Court.

Preceding this trip by some several weeks, Mr. GRANT went to an agent of LLOYDS OF LONDON and took out a policy of insurance on his accidental death because he was uninsurable because of "heart disease" and had been uninsurable for a number of years. He named the GRANT CONSTRUCTION COMPANY, which he founded, as its beneficiary in the event of an accidental death, independent of all other causes. The policy was issued in the amount of $100,000.00 and the premium paid. Mr. GRANT died and the reason for death is set forth in the autopsy and is corroborated by the medical testimony and the findings of the trial judge.

Action was brought on the policy some time later

and was pending for nearly five (5) years before brought to trial before the District Court, sitting without a jury. There was only one (1) eye-witness to the death and that was his then surviving widow, who has since died. Their son went up and helped recover the boat and body and bring Mrs. GRANT home but he knew nothing of the events leading up to death. (Parenthetically, the son and his wife have since been killed by an airplane accident.)

There is no question about jurisdiction or the proper parties, either at the trial or on this Appeal.

These respondents contend, and the Court found on competent evidence, that Mr. GRANT died because of a pre-existing arteriosclerosis. There is no evidence, and the Court found none, of physical exhaustion, but found that there was an existing arteriosclerosis which caused a coronary occlusion from which death occurred and also found that there was insufficient evidence to sustain a finding of death from physical exhaustion.

The Court also found that there was no failure of transportation or of the boat. That it was operative and manageable and that it did not fail and that "it did not fail as a means of transportation within the clear meaning of the policy" and, in fact, at the time of the exertion by Mr. GRANT, its operation had been voluntarily stopped. It is

conclusive that there was a pre-existing arteriosclerotic condition; that there was a coronary thrombosis; that the deceased had heart trouble since about the year 1950. Both doctors, being the only medical witnesses, agreed that arteriosclerosis is a disease and that it existed in Mr. GRANT , the insured.

The medical witness for the Plaintiff admitted that he relied upon the medical witness for the Defendant for pathological advice and assistance frequently on other occasions and freely admitted his qualifications in that field of medicine. This medical witness testified that the decedent had suffered from a severe arteriosclerotic condition pre-existing his death. Plaitiff's medical witness admitted, and the Court found that he had admitted, that a pre-existing arteriosclerosis would have "contributed" to the cause of death. The trial Court then found that the evidence clearly preponderates for the finding of death contributed to, if not actually caused by, the pre-existing diseased condition of the insured, and therefore the death fell within the exclusionary clause of the policy and granted judgment for the Defendant. (R. 11.)

ARGUMENT

I.

PHYSICAL EXHAUSTION--ANSWER TO SPECIFICATION OF ERROR #4.

Appellant sought recovery in the Trial Court under

a specific policy provision defining bodily ijury as follows:

> "E. DEFINITIONS: It is here understood and agreed that:
> '1. ***
> '2. BODILY INJURY WHICH SHALL OCCASION DEATH' includes, in addition to the coverage herein provided, death by exposure to the elements or physical exhaustion or drowning resulting from an accident or mechanical or other failure of anything used as a means of conveyance or transportation."

The Trial Court considered Appellant's theory of recovery under this provision at page 7 of the Memorandum Opinion (R. 7), as follows:

> "The principal thrust of Plaintiff's contentions is directed at the provision in the policy defining 'bodily injury which shall occasion death', quoted above. Coverage is there provided in case of '*** death by exposure to the elements or physical exhaustion *** resulting from *** mechanical or other failure of anything used as a means of conveyance or transportation.' Plaintiff urges that the evidence establishes death resulting from physical exhaustionn brought about by the failure of his boat to serve him as a means of transporation during an unexpected storm. No cases in point are suggested to support this contention. However, the matter can be disposed of by an application of the facts to the applicable language of the policy."

After construing this provision of the policy, which construction Appellant does not challenge, the Court considered the specific elements required to prove coverage. Beginning on page 7 of the Memorandum Opinion, and continuing

to page 8, the Court (R. 7 and 8) states:

> "Let us examine the theory that Mr. Grant expired by reason of 'physical exhaustion'. There is evidence that he expended considerable effort in attempting to beach and secure his boat and later to refloat it. However, no witness ever ventured an opinion that he died from physical exhaustion. At most, Plaintiff's doctor, in support of his opinion of accidental death, was of the view: (a) That decedent underwent 'a severe and extraordinary strain' and (b) That there was 'a relationship between this mans death and the extra-ordinary strain', and again, on cross-examination (c) 'That this stress and strain was the immediate cause of death'. Defendant's doctor on the other hand was of the opinion that the effort expended by the decedent, the worry about his wife and the immersion in cold water were only contributing factors with the pre-exhisting coronary arteriosclerosis in causing the coronary occlusion from which death occurred. There is insuffi-cient evidence to sustain a finding of death from physical exhaustion."

This finding of the Court forms the basis for Appellant's Specification of Error No. 4. In arguing that the Trial Court's finding on this issue is not sustained by the evidence, Appellant cites the testimony of decedent's wife that "he was out of breath and pale and it looked like he was very tired." (Tr. p. 30, lines 18 thru 25)

However, no conclusion was ever drawn, or opinion reached, based upon Mrs. GRANT's description of deceased prior to his death, that this indicated physical exhaustion.

Appellant's doctor testified only that there was relationship between stress and strain and the death. Tr. p. 52) More specifically, his testimony reads in part s follows:

"A. That it was an accidental death.

"Q. Would you explain your opinion?

"A. I would like to answer and bring out two particular reasons. One is the fact that this was a severe and extraordinary strain and secondarily, the fact that the time of the occurrence and the time of his death were very closely related. I feel that there is a relationship between this man's death and the extraordinary strain." (Tr. p. 52, lines 1 thru 9.)

On cross-examination, the following question and nswer were elicited:

"Q. Assuming they have had arteriosclerosis and had had it for some time, the existence of a period of time prior to this particular day would have some influence on your opinion, would it not, as to the cause of death?

"A. No, not as to the cause of death. I would say that the fact this was pre-existing would still not alter my opinion as to the fact I feel that this stress and strain was the immediate cause of death." (Tr. p. 56, lines 1 thru 9.)

On cross-examination again, Dr. PEARSON states:

"A. No, that is not it at all, sir. It is the fact that this man went into a very cold -- very cold water and was trying to hold a 1500 pound boat against the

elements. This was an excessive amount of stress. There is quite a bit of difference between that and the golf course or golf club."
(Tr. p. 61, lines 6 thru 13.)

The testimony of Dr. PEARSON set out hereinabove was directed to the question whether the death involved was an "accidental death," under O'Neil v. New York Life Insurance Company, 65 Ida. 722, 152 P.2d 707 (1944), which question was determined in favor of Appellant. The testimony established only that the death was unforeseen, sudden and unexpected.

Dr. STIER, testifying on behalf of Defendant, was of the opinion that exertion and stress would only contribute to the cause of death (See Tr. p. 88, lines 2 thru 25; p. 92, lines 10 thru 25;.)

Thus, the Trial Court had no testimony that physical exhaustion was the cause of death. No opinion was given that exertion and strain resulted in "physical exhaustion." The Trial Court would have been required to speculate on the evidence presented whether stress and strain resulted in physical exhaustion causing death.

No evidence having been presented, the Court correctly found that there was insufficient evidence to find death from physical exhaustion. Appellee respectfully contends that this finding is not clearly erroneous and is therefore binding on appeal. Kamen & Company v. Paul H. Aschkar & Company, 382 F2d 689 (9th Cir. 1967).

II.

FINDING UNCHALLENGED--FAILURE OF MEANS OF TRANSPORTATION.

The Trial Court determined that under the policy provision urged by Appellant, a showing was required not only of "physical exhaustion", but that such was the result of failure of a means of conveyance or transportation. (R. 7) At page 7 of the Memorandum Opinion, the Trial Court stated:

> "To clear away the extraneous, let us preliminarily say:
> It must be accepted to be a fact that decedent did not drown nor die from exposure to the elements; likewise there was no accident involving the boat nor was there a mechanical failure of the boat. I accept as established, for the purposes of this discussion, that the boat was a means of conveyance or transportation. It follows, then, that, if plaintiff is to prevail on this issue, death must have been from physical exhaustion resulting from a failure of the boat while being used as a means of transportation."

Appellant does not specify as error the Court's construction or finding on this provision of the insurance policy. Thus, even if it should be found that the Court erroneously determined that death was not due to "physical exhaustion," recovery would still be barred by the finding that death was not the result of a "failure of anything used as a means of conveyance or transportation." Error, if any, is harmless. Owens v. White, 380 F2d 310 (9th Cir. 1967)

roof of physical exhaustion and failure of transportation as required by the policy.

III.

CONSTRUCTION OF CONTRACT AND APPLICATION OF LEGAL PRINCIPALS

Notwithstanding the holding that there was no bodily injury" which would authorize recovery under the olicy of insurance, Trial Court went on to consider whether the provisions of the policy insured the demise f decedent reflected in the facts" (R. 9). The insuring lause of the policy under which Appellant claims coverage eads as follows:

> "INSURING CLAUSE: If at any time during the currency of this certificate the assured shall sustain any accidental bodily injury which shall, solely and independently of any other cause within twelve (12) calendar months from the date of the accident causing such bodily injury, occasion the disablement of the assured as hereinafter defined and the claim be substantiated under this Certificate, the Underwriters will pay to the Assured, his Executors, Administrators or Assigns (or in case of such bodily injury shall occasion the death of the Assured, to the Beneficiary or Beneficiaries named herein) according to the schedule of Compensation herein specified within thirty (30) days after satisfactory proof of death or disablement to the Underwriters, . . . not exceeding in all the Capital Sum of $100,000.00 . . ."

Obviously, the policy of insurance required proof

f bodily injury, and the Court having found that there was
o "bodily injury" as prayed for in the Complaint, the action
ould have been dismissed at that point. It is Appellees
ontention that insufficient error having been specified to
ully challenge the Trial Court's finding with regard to
bodily injury", that this Honorable Court should sustain the
ecision without going further.

But assuming, arguendo, that the Trial Court's
urther findings were necessary, the decision reached was
orrect.

At page 9 of the Trial Court Memorandum Opinion,
dopted as Findings of Fact and Conclusions of Law of the
ourt (R. 11), it is stated:

> "The Court now turns its attention to the subject of the policy exclusions. Having determined that death was accidental, it becomes necessary to determine whether the provisions of the policy insured the demise of decedent reflected in the facts. Defendant seeks to avoid liability on the ground that the policy provisions exclude recovery for the loss involved in this case. The burden in this jurisdiction rests on the insurer to prove the facts necessary to deny coverage. O'Neil v. New York Life Insurance Co., supra.
>
> "In capsule form, the coverage offered was for accidental bodily injury which solely and independently of other cause occasioned death and specifically excluded death directly or indirectly caused or contributed to by disease or natural causes. " (Emphasis added) (R. 9)

The insuring clause, set out heretofore in full, rovides for payment in case of death resulting from accidental odily injury "solely and independently of any other cause." he specific exclusionary language of the policy reads in ertinent part as follows:

> "1. EXCLUSIONS: This certificate does not cover death, injury or dismemberment:
> '(a.) ***
> '(b.) Directly or indirectly caused or contributed to by *** disease or natural causes ***.'"

By virtue of Erie R. Co. v. Tompkins, 304 U.S. 4 (1938), 82 L.Ed. 1188, the Trial Court correctly determined hat the substantive law of Idaho should be applied so far as scertainable. (R. 6) We are unable to cite any controlling daho decision bearing upon the facts or policy involved in his case. Nor did the Trial Court discover any "controlling r, indeed, helpful Idaho decisions." (R. 9)

The distinguishing portions of the policy of insurance ere involved clearly indicate that if disease "directly or ndirectly caused or contributed" to death, coverage is xcluded under the policy. Accidental or bodily injury must solely and independently" be the cause of death. The Trial ourt, at pages 10 and 11 of the Memorandum Opinion, declared he law applicable as follows:

> "I believe the Idaho Supreme Court would, if the case were presented to them, hold

> that if the diseased condition of Mr. Grant directly or indirectly caused or contributed to his death, then the clear terms of the policy excluded coverage for the loss claimed.
>
> "***
>
> "We deal here with a written contract of insurance which is clear and unambiguous. An exception to coverage is provided where death is caused or contributed to by any pre-existing disease. I conclude that the evidence clearly preponderates for the position that the death of deceased was contributed to, if not actually caused, by the pre-existing diseased condition of the insured. ***" (R. 10, 11)

This construction of the policy provisions and pplication of legal principles is well supported by the uthorities. Adkins v. American Cas. Co., (W. Va., 1960) 14 SE 2d 556, 84 ALR 2d 169, and cases cited at pages 202, 03, 204 and 205; Britton v. Prudential Ins. Co., (1959) 205 enn. 726, 330 SW 2d 326, 82 ALR 2d 605, at page 615, ootnote 5.

Appellant argues that a rule of "proximate cause" hould be applied, and that the arteriosclerosis of Mr. GRANT as not the proximate cause of his death. In the case of vans v. Metropolitan Life Ins. Co., 103 Wash. 429, 174 2d 961 (1946), the court considered the rule of proximate ause in reviewing a verdict for the decedent who had died hortly after pushing his automobile over a slight upgrade. he policy of insurance contained an exclusion if disease contributed" to death. The death certificate indicated

coronary thrombosis due to arteriosclerosis. In reversing the denial of a Motion for Judgment notwithstanding the verdict, the Court stated:

> "The evidence of the doctors, the pertinent portions of which are set out in this opinion, was to the effect that the condition of the insured's heart contributed to his death. The term 'proximate cause' has no application in ascertaining liability upon policies which contain clauses relieving the insurance companies from liability in cases where death is caused or contributed to directly, or indirectly, or wholly or partially, by disease, and the evidence showed that the disease contributed to the death. Where the liability of the insurance company is so restricted it is not sufficient for a beneficiary to establish a direct causal connection between the accident and the injury. He is compelled to show that the resultant condition was caused solely by accidental means; and if the proof shows a pre-existing infirmity which was a contributing factor, he cannot recover. This holding is dictated by the express terms of the contracts under consideration." (174 P2d, p. 977)

In the case of Kingsland v. Metropolitan Life Ins. Co., 97 Mont. 558, 37 P2d 335 (1934), involving a similar policy provision excluding recovery in case of a contributing disease, it was stated:

> "The term 'proximate cause' is inapt in this class of cases; under the parties express contract a recovery can be had only if death resulted 'solely' (not proximately) from injuries received through accidental means, and,

> if the insured's condition was a contributing cause, there can be no recovery. (citations omitted) The doctrine of proximate cause is applicable, in this class of cases, and was applied in the Sullivan case, 'only to aid in determining whether or not the loss was caused solely by the accident or act against which the indemenity was given.' 45 CJ 900."

Great weight must be attached to the District Court's determination as to the law of the state where there has been no clear exposition of the controlling principles by the highest court of that state. Insurance Co. of North America v. Thompson, 381 F2d 677 (9th Cir., 1967) This Honorable Court has declared that the determination of law by a District Court "will be accepted on review unless shown to be clearly wrong." Owens v. White, 380 F2d 310 (9th Cir., 1967)

IV.

EVIDENCE SUPPORTING DECISION, IN ANSWER TO SPECIFICATION OF ERROR NO. 3

The Trial Court found that the evidence wholly preponderates for the finding that death was caused or contributed to by the pre-existing arteriosclerosis of the deceased. (R. 11)

Neither of the doctors called on behalf of the parties to the action had an opportunity to examine the

eceased. However, an autopsy report and a death certificate ere entered into evidence and considered by the doctors in heir testimony. The autopsy report reads as follows:

> "Autopsy findings in this case of the late Mr. Joseph William Grant, 65 years old adult male. Time of death about 2:30 P.M., June 18, 1962. Death was due to acute coronary obstruction by infarctus of the right descending branch of the coronary artery of the heart. Death was moreorless instantaneous." (Tr. p. 57, lines 7 thru 13)

The death certificate, Defendant's Exhibit #7, ntered in evidence at page 67 of the Reporter's Transcript, tates that "Cause of Death" was "due to (or as a consequence f) arteriosclerosis. Many years."

The application for the insurance policy in question, ntered in evidence at page 19 of the Reporter's Transcript s part of Plaintiff's Exhibit #6, indicates that deceased as turned down for insurance because of a suspected heart ondition in 1950. The testimony of Mrs. GRANT, the widow of eceased, indicated that deceased had a pre-existing heart ondition. She states:

> "Q. Now he had had heart trouble prior to that time, had he not?
>
> "A. Yes, sir.
>
> "Q. He had been treated by doctors?
>
> "A. Yes.
>
> "Q. And didn't you make the statement at

another time that he had been advised not to overdue or over-exert himself?

"A. He has -- as I recall, he had not been told not to play golf or not to go fishing or anything. He didn't do extra-strenuous work, like shoveling, but he had not done anything like that."
(Tr. p. 37, lines 14 thru 25)

Again, at page 39 of the Transcript, lines 5 through , she states:

"A. I knew he had a bad heart and I tried to tell him he should take it easy myself. I don't know what had been told to him but ---"

The doctor called on behalf of Appellant in the rial Court testified primarily that decedent's death was ccidental. However, at page 54 of the Reporter's Transcript, eginning at line 19, the following is found:

"A. If he had a pre-existing arteriosclerosis and I think every one in this room has it -- that this would ---

"Q. Are you trying to say it would contribute to the cause of death?

"A. No, I am not saying it would contribute to the cause of death. A pre-existing arteriosclerosis may or may not. Well, it could contribute to the cause of death, yes." (Emphasis added)

The pertinent questions and answers continue to he next page, and are as follows:

"Q. And it would be one of the factors that would contribute to the cause of death? One of the factors?

"A. One of the factors, however ---

"Q. There would be others?

"A. Yes, on the other hand, there are many people who live with hardening of the arteries up to 100 years of age."
(Tr. p. 55, lines 1 thru 5)

At page 61 of the Reporter's Transcript, beginning n line 16 and continuing through line 22, the testimony of he doctor reads:

"Q. You just have your mind made up that this was an accidental death, haven't you, no matter what I ask you?

"A. No, accidental death could only be caused by an accident and the arteriosclerosis couldn't have anything to do with it. I am not saying it didn't have anything to do with it, but I am just going by my experience and the fact that I have testified in cases of this type where this problem has come up. . . ." (Emphasis added.)

The doctor who testified on behalf of Appellee in he trial court was one named by the doctor for Appellant. Tr. p. 62, line 21) This doctor was a specialist in pathology. Tr. p. 68, line 21) After being read a hypothetical question, he doctor testified:

"A. I don't believe it was accidental.

"Q. In that answer did you assume that there was a sclerotic condition in the body of the deceased?

"A. Yes, sir, I do, arteriosclerotic.

"Q. What effect would this condition be as concerns the hypothetical question?

"A. This disease causes narrowing of the coronary arteries and they are prone to complete obstruction which they can do at any time and frequently will do under conditions of exertion, and at the time they obstruct or occlude, that this can cause death instantaneous over a period varying time depending on how much blood supply is supplied to the heart.

"Q. Could it happen in different circumstances, different type of exertion than this?

"A. Yes. It can happen with no exertion.

"Q. Like out on a golf course or on a green?

"A. Yes.

"Q. Or on a street or in bed?

"A. Frequently happens after meals.

"Q. And that then in your opinion was the cause of his death?

"A. Yes."
(Tr. p. 73, lines 1 thru 25)

On cross-examination, the doctor testified as follows:

"Q. Doctor, the autopsy reported an acute coronary obstruction; is that true?

"A. Yes.

"Q. This could happen in an accident without disease; isn't that possible?

"A. Remotely possible. it could happen without disease." (Emphasis added)
(Tr. p. 76, lines 3 thru 9)

"A. There is medical evidence because he died with coronary thrombosis and in my opinion with obvious underlying arteriosclerosis, and the fact he was turned down for insurance for assumed heart disease twelve years previously just reinforces my opinion that he had arteriosclerosis."
(Tr. p. 79, lines 3 thru 8)

"Q. Doctor, assuming this man was exposed and standing in cold water, what effect would that have, if any, upon his circulatory system?

"A. It could have contributed to the thrombosis.

"Q. An additional shock to the system?
(Tr. p. 87, lines 21 thru 25)

"A. Yes, certainly.

"Q. Doctor, then we have here exertion, emotional stress, we have exposure to the cold, all these things, you say, would produce the thrombosis?

"A. Contribute to it.

"Q. What produces the thrombosis then?

"A. Well, this is a coagulation mechanism that is triggered off, if you will, by many different factors and it can occur spontaneously without any apparent cause."
(Tr. p. 88, lines 1 thru 10)

"Q. And thrombosis often is a product of that situation; isn't that true?

"A. Yes, certainly.

"Q. And it is by virtue of the exertion, the emotional stress or exposure to the cold that can produce this immediate situation we are talking about, thrombosis?

"A. Not per se. You have to have some basic underlying cardiac vascular disease. It wouldn't occur in vessels that were capable of responding to these added loads."
(Tr. p. 88, lines 18 thru 25)

"Q. Ninety per cent of the people that do have it, would it be a contributing factor to their death?

"A. No.

"Q. But you can't give an example where it wouldn't be?

"A. It is to a minor degree. There is no secondary changes in the heart to indicate it has caused trouble before. The major pathological findings are totally unrelated to any cardiac condition. In those situations which probably represent at least half the autopsies I perform, I would not say coronary disease contributed significantly to the death at all.

"Q. But the other half do?

"A. Well, this being the greatest cause of death today I would guess that approximately half the autopsies I perform it is either a direct cause of death or definitely was contributory, yes."
(Emphasis added) (Tr. p. 92, lines 10 thru 25)

The final testimony of the doctor was in response to redirect examination beginning on page 93 of the Transcript and continuing to page 94.

"Q. This sclerotic condition is a contributing factor in your opinion?

"A. Definitely."

Thus, there was ample evidence to support a finding that the diseased condition of Mr. GRANT was a contributing cause of his death. The Trial Court's finding is not "clearly erroneous" and therefore should be sustained under the applicable rule. Kamen & Co. v. Paul H. Aschkar & Co., 382 F2d 689 (9th Cir., 1967)

V.

ANSWER TO SPECIFICATION OF ERROR NO. 5

Appellant contends that the pre-existing disease of deceased will not defeat recovery unless it is found to be a "direct or proximate cause of death rather than a remote or contributing cause or condition."

We have here a contract of insurance which contains definite wording, clear and unambiguous. It specifically states that coverage is excluded if disease either caused or contributed to death. The plain wording of the policy was necessarily given effect.

In the case of Lively v. City of Blackfoot, 91 Idaho 80, 416 P2d 27 (1966), the Supreme Court of the State of Idaho stated: "Contracts of insurance, like other contracts, must be construed and understood, in absence of ambiguity, in their plain,

ordinary and proper sense, according to the meaning as determined from the plain wording of the policy." (citations omitted) (91 Idaho, at page 83)

The contract does not support the position contended for by Appellant. The Court should not by construction create a liability which the insurer has not assumed. Lively v. City of Blackfoot, supra.

CONCLUSION

The judgment of the Trial Court should be affirmed in every respect. The questions presented to the Trial Court were primarily upon issues of fact, and after weighing the evidence Appellant's claims were rejected. Certainly some of the testimony was conflicting, but the Trial Court had the benefit of hearing the testimony as it was given and observing each witness' demeanor and attitude. Appellee respectfully requests that no undue reliance be placed upon the isolated statement of any witness.

The only bodily injury sought to be proved by Appellant in the Trial Court was physical exhaustion resulting from a failure of transportation. The evidence in its entirety fails to establish that such an injury occurred. No other bodily injury was indicated or even suggested by the evidence. The finding of the Court that the alleged (but unproved) physical exhaustion did not result from a

failure of transportation remains unchallenged and thus should be conclusive of this Appeal. This policy requires proof of bodily injury and none is otherwise shown.

Respectfully submitted,

HAWKINS & McCABE

_____
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Res. & P. O. Address:
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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the 9th Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

_____
Attorney for Appellee

I hereby acknowledge receipt of three (3) true and correct copies of the within and foregoing Brief on the _____ day of May, 1968.

_____
Attorney for Appellant.